Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CORE CONCEPTS OF FLORIDA, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

CYRUS E. PHILLIPS, IV
Counsel of Record
1828 L Street, N.W., Suite 660
Washington, D.C. 20036-5112
(202) 466-7008

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Are Government contracts made with revolving, or working capital, funds thereby made with appropriations?

2. Is enactment of a Federal revolving, or working capital, fund, absent language in enabling legislation which provides that monies obtained from this revolving, or working capital, fund are not to be construed as Government funds or appropriated monies, sufficient to establish that a Federal instrumentality using these monies is operating as a non-appropriated fund instrumentality, or with non-appropriated funds?

PARTIES TO THE PROCEEDING

Petitioner: Core Concepts of Florida, Incorporated (Core Concepts), a Florida corporation and a small business with an express written contract for services with Federal Prison Industries, Incorporated, a wholly-owned Government corporation, 31 U.S.C. § 9101(3)(E). Core Concepts was the Plaintiff in the United States Court of Federal Claims, and Core Concepts was the Plaintiff-Appellant in the United States Court of Appeals for the Federal Circuit.

Core Concepts here discloses that it is the real party in interest, that there are no parent corporations to Core Concepts, and that there are no publicly-held companies that hold ten percent or more of Core Concepts' stock.

Respondent: The United States of America here acted through Federal Prison Industries, Incorporated (Federal Prison Industries). Federal Prison Industries is also known by its trade name, "UNICOR." Federal Prison Industries is a Government corporation of the District of Columbia. 18 U.S.C. § 4121. Federal Prison Industries was the Defendant in the United States Court of Federal Claims, and Federal Prison Industries was the Defendant-Appellee in the United States Court of Appeals for the Federal Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

CORE CONCEPTS OF FLORIDA, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Core Concepts of Florida, Incorporated, Petitioner, by undersigned counsel, under appropriate Rules of this Court, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

This matter began as a dispute under a written Government contract for services between Core Concepts and Federal Prison Industries. Federal Prison Industries on March 18th, 1999, notified Core Concepts that its contract would be terminated for convenience. Core Concepts submitted a termination settlement proposal, but a Federal Prison Industries contracting officer on April 26th, 2000, issued a final decision denying any monetary recovery. On May 24th, 2000, Core Concepts filed suit, a Contract Disputes Act action, 41 U.S.C. § 609(a)(1), against Federal Prison Industries in the United States Court of Federal Claims, 28 U.S.C. § 1491-

(a)(1), seeking money damages incurred as a result of the convenience termination.

On October 6th, 2000, Federal Prison Industries filed a Motion to Dismiss and for a Stay of Discovery. Core Concepts filed its Opposition. More than one year later, on October 16th, 2001, the United States Court of Federal Claims allowed Core Concepts' suit to proceed on the question whether Core Concepts was due a termination for convenience settlement, and, if so, the quantum of adjustment due Core Concepts. *Core Concepts of Florida, Inc. v. United States*, No. 00-308C, Senior Judge James F. Merow, Order filed October 16th, 2001. APPENDIX at 20a-36a.

On July 17th, 2002, Federal Prison Industries filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and for a Stay of Discovery. On August 23rd, 2002, the United States Court of Federal Claims issued an Order granting Federal Prison Industries' Motion to Dismiss. *Core Concepts of Florida, Inc. v. United States*, No. 00-308C, Senior Judge James F. Merow, Order filed August 23rd, 2002. APPENDIX at 17a-19a. This Order was implemented in a Judgment issued that same day that dismissed Core Concepts' Complaint. That Judgment disposed of Core Concepts' suit.

The dismissal of Core Concepts' suit was premised on the non-appropriated funds doctrine. Judgments awarded against the Government by the United States Court of Federal Claims must be paid out of appropriated funds. 28 U.S.C. § 2517. This same non-appropriated funds doctrine applies also to proceedings under the Contract Disputes Act, 41 U.S.C. § 602(a), either in agency boards of contract appeal, else in the United States Court of Federal Claims. *Pacrim Pizza Co. v. England*, 304 F.3d 1291, 1293-94 (Fed. Cir. 2002);

Furash & Co. v. United States, 252 F.3d 1336, 1343 (Fed. Cir. 2001).

Core Concepts appealed to the United States Court of Appeals for the Federal Circuit. The United States Court of Appeals for the Federal Circuit affirmed on April 30th, 2003, holding that the revolving, or working capital, fund under which Federal Prison Industries operates, 18 U.S.C. § 4126, is itself the requisite "firm indication" that Congress has intended to absolve appropriated funds from liability for Federal Prison Industries' actions, *Core Concepts of Florida, Inc. v. United States*, 327 F.3d 1313, 1336-37 (Fed. Cir. 2003), APPENDIX at 7a-9a; that the view of the Comptroller General of the United States that revolving funds, absent other language in enabling legislation, are appropriations under the Appropriations Clause, U.S. CONST., art. I, § 9, cl. 7, is "inapposite," *Core Concepts*, 327 F.3d at 1337-38, APPENDIX at 10a-11a; and that 31 U.S.C. §§ 701(2)(C), 1101(2)(C), both of which broadly define the term "appropriations" so as to include revolving, or working capital, funds such as 18 U.S.C. § 4126, are "not germane" to a determination of the Court of Federal Claims' jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), and under the Contract Disputes Act, 41 U.S.C. § 609(a)(1), *Core Concepts*, 357 F.3d at 1338-39, APPENDIX at 12a.

Core Concepts filed a Combined Petition for Panel Rehearing and a Rehearing En Banc. The United States Court of Appeals for the Federal Circuit invited, and received, a response, and thereupon the Petition for Panel Rehearing was referred to the panel that heard the appeal, and the Petition for a Rehearing En Banc was referred to the Circuit Judges in regular active service. On June 17th, 2003, the United States Court of Appeals for the Federal Circuit issued an Order denying the

Petition for Panel Rehearing, and, as well, denying the Petition for a Rehearing En Banc. *Core Concepts of Florida, Inc. v. United States*, No. 02-5172 (Fed. Cir. Order Filed June 17th, 2003), 2003 U.S. App. LEXIS 13904, APPENDIX at 15a-16a.

JURISDICTION

Subject matter jurisdiction for the suit filed with the United States Court of Federal Claims is found in the Tucker Act, 28 U.S.C. § 1491(a)(1), and in the Contract Disputes Act, 41 U.S.C. § 609(a)(1). The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction, under 28 U.S.C. § 1295(a)(3), of Appeals from final dispositions of the United States Court of Federal Claims. Core Concepts' Appeal was docketed before the United States Court of Appeals for the Federal Circuit well within sixty calendar days after entry of the Judgment by the United States Court of Federal Claims, 28 U.S.C. 2107(b).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is filed well within the ninety-day period allowed after the date of denial of the Petition for Panel Rehearing, and, as well, after the date of denial of the Petition for a Rehearing En Banc. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A principal fundamental to our Constitutional structure, the separation of powers precept embedded in the Appropriations Clause, is that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. CONST., art. I, § 9, cl. 7. *Scheduled Airlines Traffic Offices, Inc. v. De-*

partment of Defense, 87 F.3d 1356, 1361-62 (D.C. Cir. 1996).

This is the statute which establishes the Prison Industries Fund, a revolving, or working capital, fund in which monies received from product sales are deposited, and from which prison industry operations are funded:

> (a) All moneys under the control of Federal Prison Industries, or received from the sale of the products or by-products of such Industries, or for the services of federal prisoners, shall be deposited or covered into the Treasury of the United States to the credit of the Prison Industries Fund and withdrawn therefrom only pursuant to accountable warrants or certificates of settlement issued by the General Accounting Office.
>
> (b) All valid claims and obligations payable out of said fund shall be assumed by the corporation.
>
> (c) The corporation, in accordance with the laws generally applicable to the expenditures of the several departments, agencies, and establishments of the Government, is authorized to employ the fund, and any earnings that may accrue to the corporation—
>
> > (1) as operating capital in performing the duties imposed by this chapter;

(2) in the lease, purchase, other acquisition, repair, alteration, erection, and maintenance of industrial buildings and equipment;

(3) in the vocational training of inmates without regard to their industrial or other assignments;

(4) in paying, under rules and regulations promulgated by the Attorney General, compensation to inmates employed in any industry, or performing outstanding services in institutional operations, and compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution in which the inmates are confined. In no event may compensation for such injuries be paid in an amount greater than that provided in chapter 81 of title 5.

(d) Accounts of all receipts and disbursements of the corporation shall be rendered to the General Accounting Office for settlement and adjustment, as required by the Comptroller General.

(e) Such accounting shall include all fiscal transactions of the corporation, whet-

her involving appropriated moneys, capital, or receipts from other sources.

(f) Funds available to the corporation may be used for the lease, purchase, other acquisition, repair, alteration, erection, or maintenance of facilities only to the extent such facilities are necessary for the industrial operations of the corporation under this chapter. Such funds may not be used for the construction or acquisition of penal or correctional institutions, including camps described in section 4125

18 U.S.C. § 4126.

STATEMENT OF THE CASE

This matter arises upon a Contract Disputes Act claim, 41 U.S.C. § 609(a)(1), asserted under a firm fixed-price requirements contract that was awarded to Core Concepts by Federal Prison Industries to obtain services to support Federal Prison Industries' product sales to Federal customers. These products are metals goods, e.g., metal office/dormitory furniture, shelving, and storage systems, and these items are produced by prison industrial labor.

Federal Prison Industries' operations are supported by these product sales to Federal customers. Federal Prison Industries operates in accordance with Federal appropriations law, and with a permanent and indefinite revolving fund, the Prison Industries Fund, 18 U.S.C. § 4126, in which monies received from product sales are deposited, and from which prison industry operations are funded.

Funding from the Prison Industries Fund, 18 U.S.C. § 4126, for prison industry operations includes funding of Government contracts for materials, *Commercial Drapery Contractors, Inc.*, B-271222, B-271222.2, July 27th, 1996, 1996 U.S. Comp. Gen. LEXIS 329, slip op. at 1-2; funding of Government contracts for component parts and subassemblies, *Warvel Products, Inc.*, July 7th, 1999, 1999 U.S. Comp. Gen. LEXIS 126, slip op. at 2; and, as in this case, funding of Core Concepts' Government contract for support services.

Relying upon a decision of the United States Court of Federal Claims in an unrelated case, *Gary L. Aaron v. United States*, 51 Fed. Cl. 690, 694 (2002), which held Federal Prison Industries to be a non-appropriated fund instrumentality, Federal Prison Industries sought the dismissal of Core Concepts' suit as one filed against a Federal instrumentality not within the waiver of sovereign immunity for those non-appropriated fund instrumentalities listed in 28 U.S.C. § 1491(a)(1), i.e., Core Concepts' express requirements contract was not "an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration."

Core Concepts opposed, arguing that the Prison Industries Fund, a revolving, or working capital, fund authorized by specific statutory authority, is itself an appropriation. Core Concepts argued also that it ought to be a sufficient distinction that Core Concepts was before the United States Court of Federal Claims under the Contract Disputes Act, 28 U.S.C. § 1491(a)(1), 41 U.S.C. § 609(a)(1), whereas *Gary Aaron* had arisen on a Federal employee suit for overtime pay, but, if not, then

Core Concepts argued that *Gary Aaron* had been wrongly decided.

Upon review of the parties' briefs, and of *Gary Aaron*, the United States Court of Federal Claims held that Federal Prison Industries is a non-appropriated fund instrumentality, and it paid no regard to Core Concepts' argument that the Prison Industries Fund, 18 U.S.C. § 4126, is itself an appropriation. *Core Concepts of Florida, Inc. v. United States*, No. 00-308C (Fed. Cl. August 23rd, 2002), at 2, APPENDIX at 18a-19a. Moreover, in its Order dismissing Core Concepts' Complaint, the United States Court of Federal Claims held that the Contract Disputes Act's requirement for payment of judgments from the permanent indefinite judgment fund, 31 U.S.C. § 1304, 41 U.S.C. § 612(a), is limited to the non-appropriated fund instrumentalities listed in 28 U.S.C. § 1491(a)(1), notwithstanding an express provision in the Contract Disputes Act omitting any such listing, providing only that "payments made . . . shall be reimbursed to the fund provided by section 1304 of title 31 *by the agency whose appropriations were used for the contract or by obtaining additional appropriations for such purposes*," 41 U.S.C. § 612(c) (emphasis added). *Id.*

The United States Court of Appeals for the Federal Circuit affirmed. In the past, the United States Court of Appeals for the Federal Circuit has found that in each instance in which Congress intends that a Federal instrumentality it has established is to operate as a non-appropriated fund instrumentality, or with non-appropriated funds, Congress says so in enabling legislation.

In *Furash & Co. v. United States*, 252 F.3d 1336, 1341 (Fed. Cir. 2001), enabling legislation for the Federal

Housing Finance Board explicitly provided that funds received and deposited in the Treasury "shall not be construed to be Government Funds or appropriated monies. . . ." 12 U.S.C. § 1422b(c). Thus the United States Court of Appeals for the Federal Circuit held the Federal Housing Finance Board to be a non-appropriated fund instrumentality, and a federal entity not within the waiver of sovereign immunity set out in the Tucker Act, 28 U.S.C. § 1491(a)(1). *Id.*, 252 F.3d at 1341-42. *Denkler v. United States*, 782 F.2d 1003, 1005 (Fed. Cir. 1986) is similar. There enabling legislation for the Federal Reserve Board provided that assessments levied by the Federal Reserve Board upon Federal Reserve banks to support Federal Reserve Board operations "shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 244. In *Kyer v. United States*, 369 F.2d 714 (Ct. Cl. 1966), *cert. denied*, 387 U.S. 929 (1967), the enabling legislation for the particular agricultural marketing committee against which a contract claim was pressed provided that costs of operation would be assessed against private-sector producers and handlers, 7 U.S.C. § 608c(6)(D), 369 F.2d at 717, and that all of such costs would be so distributed, 7 U.S.C. § 610(b)(2)-(ii), 369 F.2d at 718.

Not this time.

The United States Court of Appeals for the Federal Circuit found that the language of the Prison Industries Fund, 18 U.S.C. § 4126, itself provides the requisite "firm indication" that appropriated funds are to be absolved from liability for the actions of Federal Prison Industries, this in the express requirement, in 18 U.S.C. § 4126(a), that monies received from product sales are to deposited to the credit of the Prison Industries Fund, and in the absence, elsewhere in 18 U.S.C. § 4126, of ex-

press authorization for the use of appropriated funds. *Core Concepts*, 357 F.3d at 1336-37, APPENDIX at 7a-9a.

The United States Court of Appeals for the Federal Circuit noted subsequent statements by other Congressional committees, statements that recognize Federal Prison Industries' self-sufficient operations. *Core Concepts*, 357 F.3d at 1337, APPENDIX at 9a-10a. Nonetheless, this recognition of self-sufficient operations in subsequent Congressional materials was dicta, for the United States Court of Appeals for the Federal Circuit clearly recognizes that it may not "fix the meaning of the statute according to the views of a later reporting committee that did not draft the statute." *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 633 (Fed. Cir. 1989).

The United States General Accounting Office has long taken the position that revolving, or working capital, funds, absent express statutory authority to the contrary, are appropriations:

> There are perhaps two "foundation rules" of revolving funds from which all else flows. One, discussed earlier, is that specific statutory authority is necessary to create a revolving fund. The second is that a revolving fund is an appropriation. Hence, funds in a revolving fund are appropriated funds. The significance of this rule is twofold. First, except as may be otherwise specified by statute, a revolving fund is available for expenditure without further appropriation action by Congress. It "is in no way dependent on the existence of [a separate] appropriation for the same purpose." B-209680, February 24, 1983. Second, unless specifically exempted, funds in a revolving fund are subject

> to the various limitations and restrictions applicable to appropriated funds.
>
> The rationale for the rule that revolving funds are appropriated funds follows from the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), and the Appropriations Clause. U.S. Const., art. I, § 9, cl. 7.
>
> In addition, 31 U.S.C. §§ 701(2) and 1101(2) define "appropriations" as including "other authority making amounts available for obligation or expenditure." A revolving fund certainly fits this definition. . . .

United States General Accounting Office, Office of the General Counsel, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Second Edition, Volume IV, March 2001, at 15-97 through 15-98. Generally, this is known as the "special funds as appropriation" principle. United States General Accounting Office, Office of the General Counsel, PRINCIPLES OF FEDERAL APPROPRIATION LAW, Second Edition, Volume I, July 1991, at 2-16-17.

The United States Court of Appeals for the Federal Circuit rejected these views of the Comptroller General of the United States as "inapposite," *Core Concepts*, 327 F.3d at 1337-38, APPENDIX at 10a-11a, and rejected also any argument that 31 U.S.C. §§ 701(2)(C), 1101(2)(C), both of which broadly define the term "appropriations" so as to include revolving, or working capital, funds such as 18 U.S.C. § 4126, control a determination of the Court of Federal Claims' jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), and under the Contract Disputes Act, 41 U.S.C. § 609(a)(1), *Core Concepts*, 357 F.3d at 1338-39, APPENDIX at 12a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT CONFLICTS WITH A DECISION OF THIS COURT AND CONFLICTS WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT MATTER

Paul v. United States, 371 U.S. 245, 261-63 (1963), holds that Government contracts made with revolving, or working capital, funds, i.e., Defense commissary funds, are made with appropriations, and *Paul* is followed in *United Biscuit Company of America, Inc. v. Wirtz*, 359 F.2d 206, 212-13 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 971 (1966), which likewise holds that Government contracts made with revolving, or working capital, funds, again, Defense commissary funds, are made with appropriations.

Contrariwise, *Core Concepts*, 327 F.3d at 1336-37, APPENDIX at 7a-9a, holds that the language of a revolving, or working capital, fund similar to the Defense Business Operating Fund, 10 U.S.C. § 2208, this the Prison Industries Fund, 18 U.S.C. § 4126 (in fact, revolving, or working capital, funds are a common Federal financing mechanism), shows that Federal Prison Industries operates as a non-appropriated fund instrumenttality, and suffices to demonstrate the required Congressional intent to absolve appropriated funds from liability for the actions of Federal Prison Industries.

The decision of this Court that is contrary to *Core Concepts* deals primarily with the question whether California could enforce her minimum wholesale price regulations with respect to milk sold on federal

enclaves. *Paul*, 371 U.S., at 247. Nonetheless, a central holding, one necessary to the disposition of that matter, is that Government contracts for milk for military mess halls, and for resale at Federal commissaries, are made with appropriated funds. These Government contracts for milk are made with revolving, or working capital, funds that operate just as the Prison Industries Fund, 18 U.S.C. § 4126(a), i.e., funds received for products or services provided out of these revolving, or working capital, funds are deposited into specific accounts, rather than into the Treasury's general fund, *Paul*, 371 U.S., at 261-63, and *Paul* holds these revolving funds to be appropriations: "Congress authorizes the payment for commissary supplies from appropriated funds," *Paul*, 371 U.S. at 262.

United Biscuit follows *Paul* to the same result. There a Government contractor challenged a Federal agency's complaint that the contractor had violated the overtime provisions of the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45, the contractor arguing that the baked goods (cookies and biscuits) it supplied military departments under Government contracts were paid for, not from appropriated funds, but rather by the consumers who bought the baked goods. *United Biscuit*, 359 F.2d at 212. *United Biscuit* rejects this defense, holding that such payments from revolving, or working capital, funds identical in language to the Prison Industries Fund, 18 U.S.C. § 4126, are Government contracts made with appropriated funds. *United Biscuit*, 359 F.2d at 212-13. The rationale of *United Biscuit* rests also on the Appropriations Clause, U.S. CONST., art. I, § 9, cl. 7:

> The proceeds from all sales made by the commissaries in question were paid into the United States Treasury and appellant

> was paid by Treasury check, charged to the appropriate military stock fund. To deny that the commissary purchases were made with appropriated moneys would be tantamount to declaring that the payments to appellant from the Treasury, and an unknown portion of the entire military procurement program, were unconstitutional.

United Biscuit, 359 F.2d at 213 n.14.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL RESOLUTION OF DISPUTES CONCERNING JURISDICTION TO RESOLVE GOVERNMENT CONTRACT CLAIMS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

Core Concepts places undue significance on the language of an ordinary, and widely-used, Federal financing mechanism. 31 U.S.C. §§ 701(2)(C), 1101(2)(C), both broadly define "appropriations" to include Federal financing mechanisms such as that used by Federal Prison Industries under 18 U.S.C. § 4126, and, contrary to *Core Concepts*, 357 F.3d at 1338-39, APPENDIX at 12a, these statutory definitions control, absent explicit statutory language or legislative history, a determination of jurisdiction over Government contract claims under the Tucker Act, 28 U.S.C. § 1491(a)(1), or under the Contract Disputes Act, 41 U.S.C. § 602(a).

Revolving, or working capital, funds, such as the Prison Industries Fund, 18 U.S.C. § 4126, are commonly

used to finance Government contracts, and they include, e.g., the Defense Business Operating Fund, 10 U.S.C. § 2208; the National Institute of Standards and Technology Working Capital Fund, 15 U.S.C. § 278b; the Department of Commerce Working Capital Fund, 15 U.S.C. § 1521, established with an initial appropriation of $100,000; the Economics and Statistics Administration Revolving Fund, 15 U.S.C. § 1527a, established with an initial, direct appropriation of $1,667,000; the Forest Service Working Capital Fund, 16 U.S.C. § 579b, created by capitalizing the present receivables, inventories, equipment, and other assets of the Forest Service; the Department of Justice Working Capital Fund, 28 U.S.C. § 527, again created by capitalizing inventories, equipment, and other assets; the Corps of Engineers Civil Revolving Fund, 33 U.S.C. § 576, created by capitalizing the present inventories, plant, and equipment of the civil works function, U.S. Army Corps of Engineers; the General Services Administration Working Capital Fund, 40 U.S.C. § 293; the General Services Administration General Supply Fund, 40 U.S.C. § 756; and the United States Geological Survey Working Capital Fund, 43 U.S.C. § 50a.

These revolving, or working capital, funds operate as does the Prison Industries Fund, 18 U.S.C. § 4126, i.e., payments received for products or services obtained with these revolving, or working capital, funds are deposited into specific accounts, rather than into the Treasury's general fund. These products or services are typically delivered under Government contracts, Government contracts wherein claims may be made only under the Tucker Act, 28 U.S.C. § 1491(a)(1), or under the Contract Disputes Act, 41 U.S.C. § 602(a).

Thus 10 U.S.C. § 2208(h) provides that reimbursements for supplies or services obtained shall be deposited into the Defense Business Operating Fund; 15

U.S.C. § 278b provides that reimbursements for services provided, including receipts from non-Federal sources, shall be deposited into the National Institute of Standards and Technology Working Capital Fund; 15 U.S.C. § 1521 provides that reimbursements from "available funds" (appropriated funds) shall be deposited into the Department of Commerce Working Capital Fund; 15 U.S.C. § 1527a provides that receipts for economic and statistical data products shall be deposited into the Economics and Statistics Administration Revolving Fund; 16 U.S.C. § 579b provides that reimbursements from Federal funds and appropriations, and from other sources, shall be deposited into the Forest Service Working Capital Fund; 28 U.S.C. § 527 provides, again, that reimbursements from Federal funds and appropriations, and from other sources, shall be deposited into the Department of Justice Working Capital Fund; 33 U.S.C. § 576 provides that reimbursements or advances for civil works furnished by the U.S. Army Corps of Engineers shall be deposited into that revolving fund; 40 U.S.C. § 293 provides that reimbursements for central office blueprinting, photostating, and duplicating services shall be deposited into that General Services Administration Working Capital Fund; 40 U.S.C. § 756(c) provides that "all reimbursements, advances of funds, and refunds or recoveries relating to personal property or services procured through the fund" shall be deposited into the General Services Administration General Supply Fund; and 43 U.S.C. § 50a provides that the Forest Service Working Capital Fund shall be "credited with appropriations and other funds of the Survey, and other agencies of the Department of the Interior, other Federal agencies, and other sources, for providing materials, supplies, equipment, work, and services."

Department of Defense commissary operations under the Defense Business Operating Fund, 10 U.S.C. §

2208, are considered as operations conducted with appropriated funds, and as such, are subject to Federal procurement laws, *Farmland National Beef*, B-286607, B-286607.2, Jan. 24th, 2001, 2001 U.S. Comp. Gen. LEXIS 2, slip op. at 1-2; public sector funds received by the National Park Service for visitor reservations are likewise considered as appropriated funds, subject to Federal procurement laws, *Washington National Arena Limited Partnership*, B-219136, Oct. 22nd, 1985, 65 Comp. Gen. 25, slip op. at 4-5; user fees collected under the Tobacco Inspection Act, 7 U.S.C. §§ 511-511q, are considered as "continuing or permanent appropriations" subject to the statutory controls and restrictions applicable to appropriated funds, *Tobacco Inspectors, Department of Agriculture—Payment of Employee's Share of Health Insurance from Tobacco User Fund*, B-212484, April 10th, 1984, 63 Comp. Gen. 285, slip op. at 5-6; and user fee toll charges collected by the Saint Lawrence Seaway Development Corporation, another wholly-owned Government corporation, are likewise considered as "appropriated funds and are subject to any restrictions applicable to the expenditure of appropriated funds," *Applicability of FY 1979 5.5 Percent Pay Increase Ceiling to Employees of Saint Lawrence Seaway Development Corporation*, B-193573, Jan. 8th, 1979, 1979 U.S. Comp. Gen. LEXIS 3060, slip op. at 6-7.

The Contract Disputes Act's "well-conceived structure" for adjudication of Government contract disputes, *Pacrim Pizza*, 304 F.3d at 1295 (dissenting opinion), treats cases arising from claims on Government contracts made with these revolving, or working capital, funds as within the jurisdiction of agency boards of contract appeal, for, under the Contract Disputes Act, 41 U.S.C. § 602(a), agency boards treat these revolving, or working capital, funds as appropriations.

Before the Armed Services Board of Contract Appeals in *EROS Division*, 1998 ASBCA LEXIS 210, *8-*9 was a sales contract, the proceeds of which were to be deposited into the Defense Business Operating Fund, 10 U.S.C. § 2208. EROS, the contractor, contended that statutory and regulatory requirements for synopsis and justification of the non-competitive award it had received did not apply because the revolving, or working capital, fund into which contract proceeds were to be deposited was not an appropriated fund. The Armed Services Board of Contract Appeals did not agree:

> Most importantly, general appropriations principles and legislation apply to revolving funds. "They are no less subject to statutory restrictions than the appropriations that fund them, and are restricted to the purposes for which they were authorized by law." McGrath, "An Introduction to Fiscal Law in Government Contracting," *29 A.F.L. Rev. 207, 216 (1988).*
>
> > Under the revolving fund concept, receipts . . . from the disposal of surplus property under the fund are appropriations which are credited to the fund to avoid its depletion, and an annual business-type accounting is made to the Congress. Congressional control over these funds is exercised through appropriation legislation.
>
> NAVY CONTRACT LAW, 2d Ed., 1959, § 4.10.

1998 ASBCA LEXIS 210, *19; *see also Pulsar Data Systems, Inc.*, GSBCA No. 13233, June 25th, 1996, 96-2 BCA ¶ 28,407, 1996 GSBCA LEXIS 143, *6 (GSA Working Capital Fund, 40 U.S.C. § 293).

Core Concepts throws this "well-conceived structure" into disarray. Government contracts implement the statutory scheme for resolution of Government contract claims through provisions that require dispute resolution under the Contract Disputes Act, 41 U.S.C. §§ 601-613. A requirement of the Contract Disputes Act, 41 U.S.C. § 602(a), and, as well, a requirement of the Tucker Act, 28 U.S.C. § 1491(a)(1), is that these Government contracts must be financed with appropriated funds.

Heretofore, Government contractors could be confident that if Congress intended a particular Federal instrumentality to operate as a non-appropriated fund instrumentality, or with non-appropriated funds, Congress would have said so in enabling legislation.

No more.

Under *Core Concepts*, virtually every Federal instrumentality that operates with revolving, or working capital, funds (and there are many such instrumentalities) will be considered to operate as a non-appropriated fund instrumentality, or with non-appropriated funds. And the non-appropriated funds doctrine will bar jurisdiction in the very forums that Congress has created to adjudicate Government contract disputes. Government contractors whose products or services are paid for with these revolving, or working capital, funds will have no places in which they can obtain resolution of their disputes.

CONCLUSION

This petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted.

CYRUS E. PHILLIPS, IV
Counsel of Record
1828 L Street, N.W., Suite 660
Washington, D.C. 20036-5112
(202) 466-7008

August 2003

(Any footnotes trail the end of each document)

02-5172

United States Court of Appeals for the Federal Circuit

CORECONCEPTS OF FLORIDA, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Cyrus E. Phillips. IV, of Washington, DC, argued for plaintiff-appellant.

Kyle E. Chadwick, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, argued for defendant-appellee. With him on the brief were David M. Cohen, Director; and Deborah A. Bynum, Assistant Director. Of counsel on the brief was Mary E. Carney, Assistant General Counsel, Federal Bureau of Prisons, of Washington, DC.

Appealed from: United States Court of Federal Claims

Senior Judge James F. Merow

02-5172

United States Court of Appeals for the Federal Circuit

CORECONCEPTS OF FLORIDA, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: April 30, 2003

Before LOURIE, GAJARSA, and LINN, Circuit Judges.
LOURIE, Circuit Judge.

CoreConcepts of Florida, Inc. appeals from the decision of the United States Court of Federal Claims dismissing its complaint under the Contract Disputes Act ("CDA") for lack of jurisdiction. CoreConcepts of Fla., Inc. v. United States, No. 00308C (Fed. Ct. Aug. 23, 2002). Because the non-appropriated funds doctrine bars the Court of Federal Claims from having jurisdiction over this case, we affirm.

BACKGROUND

Federal Prison Industries ("FPI," also known by its trade name "UNICOR") is a government-owned corporation that was created in 1934 to provide work simulation programs and training opportunities for inmates of federal correctional facilities. Act of June 23, 1934, Pub. L. No. 73-461, 48 Stat. 1211 (codified as amended at 18 U.S.C. §§ 4121-4129 (2000)); see 28 C.F.R. § 345.11 (2003). On June 10, 1997, FPI awarded CoreConcepts, a business that markets furniture and

storage systems to federal agencies, a firm fixed-price services contract to support FPI's product sales to federal customers. By letter dated March 18, 1999, FPI notified CoreConcepts that the contract would be terminated for convenience, effective April 18, 1999. CoreConcepts submitted a termination settlement proposal, but the contracting officer issued a final decision denying recovery.

CoreConcepts then filed suit against the United States in the Court of Federal Claims, seeking an equitable adjustment and money damages resulting from the contract termination. After certain breach of contract claims had been dismissed, the court granted the government's motion to dismiss CoreConcepts' remaining claims for lack of jurisdiction. CoreConcepts, slip op. at d. Relying on Aaron v. United States, 51 Fed. Ct. 690 (2002), as well as the statutes and legislative history cited by the parties, the court agreed with the government that Congress has declared that FPI is to operate without appropriated funds. CoreConcepts, slip op. at c. Therefore, the court concluded, FPI is a non-appropriated fund instrumentality ("NAFI") and jurisdiction under the Tucker Act, 28 U.S.C. § 1491 (2000), is lacking. CoreConcepts, slip op. at c. The court also noted that FPI is not listed in 28 U.S.C. § 1491(a)(1), which confers Tucker Act jurisdiction over contract claims involving certain NASA and military NAFI's. Id. Furthermore, the court held that the CDA does not provide a basis for jurisdiction over this case, rejecting CoreConcepts' argument that the CDA requires the government to pay judgments from the permanent indefinite judgment fund. Id. The court thus concluded that it lacked jurisdiction and dismissed CoreConcepts' action.

CoreConcepts timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

Whether the Court of Federal Claims properly dismissed CoreConcepts' complaint for lack of jurisdiction is a question of law that we review de novo. Boyle v. United States, 200 F.3d 1369, 1372 (Fed. Cir. 2000).

The Tucker Act confers upon the Court of Federal Claims jurisdiction with respect to claims "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1) (2000). The jurisdictional grant of the Tucker Act is limited, however, by the general requirement that judgments awarded against the government be paid out of appropriated funds. Furash & Co. v. United States, 252 F.3d 1336, 1339 (Fed. Cir. 2001); L'Enfant Plaza Props., Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982); see also 28 U.S.C. § 2517 (2000) ("Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor .....). Thus; absent some specific jurisdictional provision to the contrary, the Court of Federal Claims generally lacks jurisdiction over actions in which appropriated funds cannot be obligated. [1] Furash, 252 F.3d at 1339; L'Enfant, 668 F.2d at 1212.

However, we have interpreted that jurisdictional requirement to mean that, when an issue arises under the non-appropriated funds doctrine, the Court of

Federal Claims must exercise jurisdiction absent a "dear expression by Congress that it intended to separate the agency from general federal revenues." Furash, 252 F.3d at 1339. To establish jurisdiction, the plaintiff need not show that appropriated funds have actually been used for the agency's activities, but that "under the agency's authorizing legislation Congress could appropriate funds if necessary." Id. (quoting L'Enfant, 668 F.2d at 1212). In other words, Tucker Act jurisdiction exists unless there is a "firm indication by Congress that it intended to absolve the appropriated funds of the United States from liability for acts" of the agency. Id. (quoting L'Enfant, 668 F.2d at 1212).

On appeal, CoreConcepts argues that the Court of Federal Claims erred in dismissing its complaint for lack of jurisdiction and contends that FPI is not a NAFI for several reasons. First, it argues that FPI's operating fund, the Prison Industries Fund, is considered to be an appropriation under the "special funds as appropriation" principle. CoreConcepts cites decisions of the Comptroller General as establishing that the Prison Industries Fund is a "continuing appropriation" and that FPI is therefore not a NAFI. In that vein, CoreConcepts asserts that Aaron, in which the Court of Federal Claims held FPI to be a NAFI outside the jurisdictional grant of the Tucker Act, was wrongly decided. Second, CoreConcepts argues that the Prison Industries Fund originally derived from appropriated funds and that Congress has not provided the requisite "firm indication" that appropriated funds were to be absolved from liability for FPI's actions. Third, CoreConcepts asserts that all "revolving" funds, including the Prison Industries Fund, are appropriations in view of 31 U.S.C. §§ 701(2)(C) and 1101(2)(C) as well as the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7. Finally, CoreConcepts maintains

that Tucker Act jurisdiction exists because under the CDA any judgment against the government would have to be paid from the permanent indefinite judgment fund and then reimbursed by FPI.

The government responds that the Court of Federal Claims properly dismissed CoreConcepts' complaint for lack of jurisdiction. The government argues that FPI is a NAFI because, among other things, it functions as a self-sufficient corporation and does not receive any appropriations. Citing Aaron, the government maintains that FPI's enabling statute, which segregates FPI's monetary assets from the Treasury's general fund and does not authorize the appropriation of general receipts to FPI's account, provides the necessary "firm indication" that Congress intended to absolve appropriated funds from liability for FPI's actions. The government further argues that the Comptroller General's position that all "revolving" funds are appropriated funds is an overstatement and should be rejected by this court. In addition, the government contends that the Appropriations Clause of the U.S. Constitution is simply a restriction on the executive branch's disbursing authority and does not distinguish between appropriated and non-appropriated funds held by the government. Finally, the government argues that 31 U.S.C. §§ 701(2)(C) and 1101(2)(C) are of "dubious relevance" to the Tucker Act and are expressly qualified as applying only "in [the] appropriate context."

We agree with the government that the Court of Federal Claims properly dismissed CoreConcepts' complaint for lack of jurisdiction under the non-appropriated funds doctrine. To begin with, FPI does not operate with appropriated funds. It is a self-sufficient corporation whose funds are derived

primarily from its product sales, and it receives no congressional appropriations. Aaron, 51 Fed. Cl. at 692; see also El Sheikh v. United States, 177 F.3d 1321, 1322 (Fed. Cir. 1999) ("[NAFIs] are federal government entities whose 'monies do not come from congressional appropriation but rather primarily from [their] own activities, services, and product sales.'" (second alteration in original) (citation omitted)). CoreConcepts points out that, although FPI is self-sufficient, the Prison Industries Fund was derived from appropriated funds. Indeed, the Prison Industries Fund initially comprised funds transferred from the prison industries working capital fund, which itself was derived in part from appropriations made in 1918 and 1924 to support programs at the Atlanta and Leavenworth prisons. Donation Under 40 U.S.C. § 484(1) of Surplus Personal Prop. of Fed. Prison Indus., Inc., 60 Comp. Gen. 323, 324-26 (1981). However, FPI repaid its initial funding soon after its inception in 1934 and has never received any appropriations from Congress since that time. Id. at 326. Although appropriations were made to FPI's predecessors, that fact is of no consequence to our analysis under the non-appropriated funds doctrine: it says nothing of Congress's intentions concerning the funding of FPI's operations, which we discuss below, and it fails to satisfy the jurisdictional requirement of obligating appropriated funds to pay judgments against the government.

FPI's self-sufficiency as a corporation is not determinative of its NAFI status. More telling are Congress's intentions regarding the nature of FPI's funding, which can best be understood from FPI's enabling legislation. Specifically, 18 U.S.C. § 4126 provides in relevant part that:

(a) All moneys under the control of Federal Prison Industries, or received from the sale of the products or byproducts of such Industries, or for the services of federal prisoners, shall be deposited or covered into the Treasury of the United States to the credit of the Prison Industries Fund and withdrawn there from only pursuant to accountable warrants or certificates of settlement issued by the General Accounting Office.

(b) All valid claims and obligations payable out of said fund shall be assumed by the corporation.

(c) The corporation, in accordance with the laws generally applicable to the expenditures of the several departments, agencies, and establishments of the Government, is authorized to employ the fund, and any earnings that may accrue to the corporation –

(1) as operating capital in performing the duties imposed by this chapter;

(2) in the lease, purchase, other acquisition, repair, alteration, erection, and maintenance of industrial buildings and equipment;

(3) in the vocational training of inmates without .regard to their industrial or other assignments;

(4) in paying, under rules and regulations promulgated by the Attorney General, compensation to inmates employed in any industry, or performing outstanding services in institutional operations, and compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution in which the inmates are confined.

18 U.S.C. § 4126(a)-(c) (2000). Although that statute does not, as CoreConcepts points out, expressly prohibit Congress from appropriating funds to FPI, the absence of such a statement in an agency's enabling legislation is not dispositive of the agency's NAFI status. Furash, 252 F.3d at 1340. Instead, we must determine whether Congress has clearly expressed its intent that the agency, or the particular activity that gave rise to the dispute in question, is to be separated from general federal revenues. Id.; Denkler v. United States, 782 F.2d 1003, 1005 (Fed. Cir. 1986).

We believe that Congress has expressed just that intent through FPI's enabling legislation. By directing that all monies under FPI's control be deposited into the U.S. Treasury to the credit of the Prison Industries Fund, §4126 makes clear that FPI's funds are to be kept distinct from general federal revenues. Aaron, 51 Fed. Cl. at 693; see Furash, 252 F.3d at 1339-40 (holding that the Federal Housing Finance Board is a NAFI because its authorizing legislation provides a scheme whereby any surplus is credited to assessed banks rather than the Treasury's general fund, and any deficiency is made up by special assessments rather than appropriated funds). Notably, FPI's enabling legislation includes "no authorization of appropriations, such as is usually found in the statutory charters of governmental entities which may rely on such appropriations in whole or in any part." [2] Denkler, 782 F.2d at 1005 (holding that the Federal Reserve Board of Governors is a NAFI because its enabling statute, which designates bank assessments as the source of funds and does not expressly authorize funds to be appropriated, provides a "clear expression" that Congress intended the agency to be separated from general federal revenues). Moreover, several congressional reports relating to FPI's operations provide evidence of Congress's own

understanding that FPI is to operate entirely without appropriated funds. E.g., H.R. Rep. No. 101-681(1), at 141 (1990), reprinted in 1990 U.S.C.C.A.N. 6472, 6547 (noting that FPI "is self-sufficient and does not receive any appropriation"); see also Aaron, 51 Fed. Cl. at 693 (collecting similar statements from other congressional reports). In light of FPI's enabling legislation and legislative history, we conclude that Congress has clearly expressed its intention that FPI's funds are to be segregated from general federal revenues, thereby providing a "firm indication" that it intended to absolve appropriated funds from liability for FPI's actions. Accordingly, we agree with the Court of Federal Claims' conclusion that FPI is a NAFI for which the United States is not financially answerable in that court.

CoreConcepts' other arguments to the contrary are unpersuasive. CoreConcepts cites decisions of the Comptroller General for the proposition that the Prison Industries Fund is itself an appropriation. Although the Comptroller General has characterized the Prison Industries Fund as a "continuing appropriation," that position is inapposite to the jurisdictional question before us. In Donation Under 40 U.S.C. 484(j) of Surplus Personal Property of Federal Prison Industries, Inc., 60 Comp. Gen. 323 (1981), the Comptroller General held that § 4126 makes the revenues received from sales of FPI's products a "continuing appropriation" by authorizing their deposit into a specific account to be used for FPI's operations. Id. at 326. That view, however, is inconsistent with our case law concerning Tucker Act jurisdiction; under the non-appropriated funds doctrine, FPI is a NAFI precisely because § 4126 authorizes the deposit of FPI's revenues into a specific account from which claims and obligations may be paid, rather than the Treasury's general fund. That provision indicates that Congress intended to keep FPI's funds separate from general federal revenues.

Moreover, the Comptroller General's view of what constitutes an appropriation appeared in the context of interpreting particular regulations. E.g., id. at 327 (holding that the Prison Industries Fund is not a non-appropriated fund within the meaning of 41 C.F.R. § 101-44.001-3, a regulation defining donable property). It is not applicable to the separate determination whether general funds of the Treasury may be obligated, and hence whether jurisdiction exists, for a claim involving a contract to which FPI was a party. Accordingly, we decline to adopt the Comptroller General's characterization of the Prison Industries Fund as an appropriation in the present context of determining whether jurisdiction exists under the Tucker Act.

CoreConcepts also urges us to adopt the view of the General Accounting Office ("GAO") that all "revolving" funds, including the Prison Industries Fund, are appropriations. We decline to do so. According to the GAO, a revolving fund - i.e., a single account to which receipts are credited and from which expenditures are made - is composed of appropriated funds that are available for expenditure without further congressional action. IV U.S. Gen. Acct. Office, Principles of Federal Appropriations Law 15-83, -97 (2d ed. 2001) ("Federal Appropriations Law"). The authorities cited by the GAO to support that position, however, are not applicable to the non-appropriated funds doctrine in the same sense that they are applicable to federal appropriations law. First, the Miscellaneous Receipts Act requires that money received by the government be deposited into the "general fund of the Treasury. See 31 U.S.C. § 3302(b) (2000). The Prison Industries Fund, however, is not subject to that requirement in that it retains receipts for FPI, rather than for the government generally, and deposits those receipts into a special

account, rather than into the Treasury's general fund. See Federal Appropriations Law, supra, at 15-82. The Miscellaneous Receipts Act thus does not establish that the Prison Industries Fund is an appropriation of general funds. Secondly, the Appropriations Clause provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law. . . ." U.S. Const. art. I, § 9, cl. 7. It imposes "a restriction upon the disbursing authority of the Executive [Branch]," Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937), but again does not by itself transform FPI's funds, which reside in an independent account within the Treasury, into general funds of the United States that can be used to pay judgments. Third, although 31 U.S.C. §§ 701(2)(C) and 1101(2)(C) define the term "appropriations" to include, in addition to funds provided directly by Congress, "other authority making amounts available for obligation or expenditure," that broad definition expressly applies only to chapters 7 and 11 of U.S.C. title 31 and only "in appropriate context." 31 U.S.C. §§ 701(2)(C), 1101(2)(C) (2000). It is not germane to a determination of jurisdiction under the Tucker Act. Thus, we conclude that CoreConcepts' reliance on the GAO's view that all revolving funds are appropriations is misplaced, for it does not change the conclusion that a judgment against FPI would obligate only FPI's funds, which are, and which Congress intended to be, distinct from the Treasury's general funds.

Finally, CoreConcepts argues that the CDA provides jurisdiction under the Tucker Act in this action because any judgment against the United States would have to be paid from the permanent indefinite judgment fund, see 31 U.S.C. § 1304 (2000), and then reimbursed by FPI. However, we have previously held that the CDA does not extend the Court of Federal Claims'

jurisdiction to actions involving NAFIs like FPI. In Furash & Co. v. United States, 252 F.3d 1336 (Fed. Cir. 2001), we recognized that the non-appropriated funds doctrine applies to the CDA in the same way that it applies to the Tucker Act. Id. at 1343. Thus, with respect to NAFIs, lack of jurisdiction under the Tucker Act amounts to lack of jurisdiction under the CDA. Moreover, we explained that the CDA's reimbursement provision, 41 U.S.C. § 612(c) (2000), applies only to "agencies whose appropriations were used for the contract" and not to NAFIs other than the military exchanges and NASA exchange councils specifically identified in the Tucker Act. Furash, 252 F.3d at 1343. Having determined FPI to be a NAFI for which the United States is not financially answerable in the Court of Federal Claims for the reasons discussed above, we thus conclude that the CDA does not confer jurisdiction over this action.

CONCLUSION

The Court of Federal Claims correctly concluded that FPI is a NAFI whose contracts are not expressly deemed contracts with the United States under the Tucker Act and that it therefore lacked jurisdiction over CoreConcepts' complaint. Accordingly, the decision of the Court of Federal Claims is

AFFIRMED.

FOOTNOTES

1 Congress has, however, vested the Court of Federal Claims with jurisdiction over actions involving contracts with military post exchanges and the exchange councils of NASA. 28 U.S.C. § 1491(a)(1) (2000) ("[A]n express or implied contract with the

Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States."); see Furash, 252 F.3d at 1339.

2 In contrast, Congress had expressly authorized appropriations for the prison industries working capital fund, the operating fund of the prison industries program in existence before FPI was established as a government corporation. Act of May 27, 1930, Pub. L. No. 71-271, § 5, 46 Stat. 391, 392 ("There are authorized to be appropriated such additional sums as may from time to time be necessary to carry out the provisions of this Act.").

02-5172 (CFC - 00-CV-308)

CORECONCEPTS

V

US,

O R D E R

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 24, 2003.

FOR THE COURT,
Jan Horbaly Clerk

Dated: June 17, 2003

cc: Cyrus E. Phillips, IV Kyle Chadwick

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

No. 00-308C
(Filed August 23, 2002)

In the United States Court of Federal Claims

CORECONCEPTS OF FLORIDA, INCORPORATED,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

ORDER

This litigation is premised on the March 18, 1999, termination of a firm fixed price requirements contract, consisting of five option years, awarded to plaintiff on June 10, 1997 by UNICOR, a wholly-owned corporation of the United States Government.

By a 13-page Order, filed October 16, 2001, certain breach of contract claims pleaded by plaintiff were dismissed, and by a separate Pretrial Order, also filed on October 16, 2001, comprehensive pretrial procedures were prescribed and scheduled with respect to the termination settlement claims remaining for resolution. The parties proceeded to comply with the October 16, 2001 Pretrial Order and substantial discovery and audit activity has been undertaken.

On July 18, 2002, defendant filed a Motion to Dismiss For Lack Of Subject Matter Jurisdiction And For A Stay Of Discovery. Plaintiff's opposition was filed on July 31, 2002 and defendant's reply was filed on August 19, 2002.

Defendant's motion to dismiss was initiated by the ruling in Aaron v. United States 51 Fed. Cl. 690, 691-94 (2002) that UNICOR is a non-appropriated fund instrumentality ("NAFI"). If UNICOR is a NAFI, jurisdiction in this court over the contract termination settlement claims presented would be lacking. This is because UNICOR is not listed in 28 U.S.C. 1491(a)(1) as a NAFI whose contract" . . . shall be considered an express or implied contract with the United States." This language was added to the Tucker Act in 1970 to close the "loop-hole" in the Act's coverage which resulted from the decision in Standard Oil Co. of California v. Johnson 316 U.S. 481 (1942) and subsequent Court of Claims decisions denying Tucker Act jurisdiction over claims brought against NAFIs. United States v. Hopkins 427 U.S. 123, 125-126 (1976). The solution Congress reached was to list in the Tucker Act the specific National Aeronautics and Space Administration (NASA) and military NAFIs, whose contracts would be deemed to be "with the United States" and, therefore, covered by the Tucker Act, McDonald's Corp. v. United States 926 F.2d 1126, 1131-33 (Fed. Cir. 1991).

As UNICOR is not a NASA or a military organization, the 1970 language added to 28 U.S.C. 1491 (a)(1) cannot provide Tucker Act coverage, so jurisdiction over this litigation can be present only if UNICOR is not a NAFI. Upon review of the opinion in Aaron, 51 Fed. Cl. 693-94, and the statutes and legislative history set forth in the parties' briefs it is evident Congress has decreed that UNICOR is to operate without appropriated funds, i.e., its operation employs funds derived from the sale of products or by-products by UNICOR or services of federal prisoners. Congress has separated UNICOR from general federal revenues. See Furash & Co. v. United States 252 F.3d 1336, 1339

(Fed. Cir. 2001); Butz Engineering Corp. v. United States 204 Ct. Cl. 561, 572,499 F.2d 619, 625 (1974); Kyer v. United States,. 177 Ct. Cl. 747, 751, 369 F.2d 714, 718 (1966), cert. denied, 387 U.S. 929 (1967). In this circumstance UNICOR is a NAFI.

Plaintiff's argument (opposition brief pp. 27-28), that the Contract Disputes Act's requirement for payment of judgments from the permanent indefinite judgment fund (31 U.S.C. 1304141 U.S.C. 612 (a)) with reimbursement by the agency whose appropriations were used for the contract (41 U.S.C. 612 (c)) confirms this court's jurisdiction over the UNICOR contract claims plaintiff has pleaded, is not valid. With the exception of those listed in 28 U.S.C. 1491(a)(1), the judgment fund is not used to satisfy the obligations of NAFIs. Lee by Lee v. United States 129 F.3d 1482, 1484 (Fed. Cir. 1997).

Without subject matter jurisdiction, proceedings cannot go forward in this matter and the defendant's motion to dismiss must be granted. With a dismissal, the motion to stay discovery becomes moot.

Accordingly, it is ORDERED that because the contracting party, UNICOR, is a NAFI, but not one included among those named in 28 U.S.C. 1491(a)(1), jurisdiction over this litigation is lacking and the Defendant's Motion To Dismiss is GRANTED, with no costs to be assessed.

James F. Merow
Senior Judge

No. 00-308C
(Filed October 16, 2001)

In the United States Court of Federal Claims

CORECONCEPTS OF FLORIDA, INCORPORATED,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

ORDER

This government contract matter comes before the Court on Defendant's Motion to Dismiss and for a Stay of Discovery together with Plaintiff's Opposition thereto.

FACTS

The agreement which is involved in this litigation was a firm fixed-price requirements contract, consisting of five option years, awarded to plaintiff on June 10, 1997 by UNICOR, a wholly-owned corporation of the United States Government, (Federal Prison Industries, Inc., Federal Bureau of Prisons, Department of Justice). The contract required plaintiff, by means of a network of dealers throughout the United States, to provide certain services to UNICOR's customer base relating to the sale of metal products produced by UNICOR in its factories which employ inmates of Federal prisons.

Specifically, the work statement provided (in part):

* * * *

Services include all effort necessary to satisfy the customer demands while closing a sale. This includes administrative effort and coordination activity (i.e. tracking, reports, order expediting, coordination, etc.), design services, layout services, inside delivery, setup assembly, trash removal, installation, warranty work, and incidental items that may be required to complete the job to the satisfaction of the customer.

* * * *

Def's Ex. A at 13.

For payment, the contract contained three line items. The major item was a customer service fee. With regard to this payment item, the work statement provided as follows:

The customer service fee is only collectable if the sale is closed and Unicor accepts the order. No money will be paid for referring customers to Unicor for handling by internal sales staff. Additionally, no fees will be paid, regardless of effort expended, on work that does not become a sale accepted by Unicor. (A percentage of the sales price of the product should be inserted in Section 3 as a not to exceed percentage.) This fee is to cover selling expenses associated with making the sale, as well as, typical costs of doing business including, after sales service such as, warranty work or other post sales activity. This fee represents the total amount of money paid from Unicor to the offer or for a sale unless the offer or incurs costs that fits one of the other line items contained in this contract. This fee represents all costs including overhead that the offer or generates in conducting business.

* * * *

Def.'s Ex. A at 14.

The customer service fee plaintiff proposed and included in the contract was 8% to 10% percent of the sale price, depending on the sales price.

The other line items the contract provided for payment were for installation, delivery services and related activity, and for design, layout and engineering type services. These items were included on an hourly rate basis.

The contract distinguished between "registered" accounts for which plaintiff provided ongoing services, new accounts plaintiff brought to UNICOR and "house" accounts representing existing UNICOR customers, such as Federal agencies that were required by law to use UNICOR's products. Plaintiff received service fees for accounts registered with UNICOR's Sales Director's Office, but did not receive fees for house accounts.

By modification 0002, to the contract, it was agreed that plaintiff would obtain a flat service fee of 9% on registered accounts and 4% on all sales, including house accounts, for the period September 1, 1997 through September 30, 1998. Def.'s Ex. B at 119-120. However, it was also agreed that if plaintiff achieved the quota established in a sales plan, an additional 1 % would be added to the 4% fee but if a quota was not achieved, plaintiff would rebate 1 % of the 4% fee to UNICOR. Id. at 170.

By letter dated March 10, 1999, plaintiff presented a claim for service fees for the period between October 1, 1998 and March 1, 1999, apparently on the basis set forth in modification 0002, which was effective for the

period September 1, 1997 through September 30, 1998. Plaintiff requested an accounting of sales between October 1, 1998 and March 1, 1999. Def.'s Ex. F at 174-77.

By a letter dated March 18, 1999, the contracting officer advised plaintiff that its March 10, 1999 claim was not properly certified under the Contract Disputes Act of 1978, but noted, "[i]n accordance with your request, UNICOR will provide CoreConcepts with sales data generated since October 1,1998." Def.'s Ex. G at 179.

Also, by a letter dated March 18,1999, from the contracting officer to plaintiff, UNICOR provided notification that the contract ". . . is completely terminated under the clause entitled FAR 52.249-2, Termination for Convenience of the Government." Def's Ex. C at 134. The termination was made effective April 18, 1999. The letter further provided:

* * * *

All contractor and subcontractor performance, marketing, quoting and work under this contract required in securing orders from UNICOR Federal customers will stop within thirty (30) days from today. The contractor will be responsible for continuing marketing services and support activities for orders received and accepted by UNICOR within thirty (30) days from today. All orders submitted by CoreConcepts to UNICOR and accepted within thirty (30) days from today will be paid when delivered and installations are accepted and paid by the customer.

All telephone calls for quotations shall be forwarded to FCI Lexington, KY customer service department within

thirty (30) days of this notice. Notify the Contracting Officer of all pending installation jobs and completion dates and of any special circumstances precluding the stoppage of work. Take the necessary or directed action to protect and preserve property in the contractor's possession in wherein [sic] the Government has or may acquire an interest.

Attached is Standard Form 1438 (Settlement Proposal - Short Form), which you are responsible for preparing as part of your settlement proposal. This form will be used to settle all outstanding liabilities and all proposals arising out of termination of the contract, obtaining any approvals or ratifications required by the Contracting Officer.

Promptly notify the Contracting Officer in writing of any legal proceedings growing out of any subcontract or other commitment related to the termination. Submit to the Contracting Officer within thirty (30) days from this date your settlement proposal supported by appropriate schedules.

Invoice acceptable sales under the contract in the usual way and do not include them in the settlement proposal.

* * * *

Id. at 134-35.

By a letter, dated March 19, 1999, counsel for plaintiff requested sales data for the period between October 1, 1998 and March 1, 1999, which was asserted to be required ". . . to establish the additional service fee due on unregistered sales." Counsel indicated that, "[o]nce CoreConcepts has this sales data, we can then establish

the contract price for completed services." Def's Ex. H at 181. Counsel also stated that, "[i]n the meantime, CoreConcepts is fully complying with its obligations under FAR 49.104 and subparagraph (b) of the FAR 52.249-2 provision, and it is making arrangements to commence preparation of a termination settlement proposal." Id. The letter concluded with the following paragraph:

Our initial estimate is that the net payment that will be requested in our final termination settlement proposal will be some $1,500,000. This net payment is exclusive of the contract price as revised to account for the additional service fee due to CoreConcepts on unregistered sales generated between October 1st, 1998, and March 1st, 1999. I am looking forward to working with you as we adjust the contract price and finally settle this convenience termination.

Id. at 182.

By a letter, dated April 9, 1999, the contracting officer forwarded the sales data requested by plaintiff but also responded as follows (in part):

* * * *

By providing CoreConcepts with this sales data, UNICOR in no way concedes that CoreConcepts is entitled to any additional customer service fees on "unregistered sales generated between October 1, 1998 and March 1, 1999." UNICOR instead believes that CoreConcepts is entitled to only those customer service fees that are provided for in the contract.

The contract provides for customer service fees not to exceed 8% to 10% for orders submitted by

CoreConcepts to UNICOR for approval and acceptance by UNICOR. UNICOR's only adjustment to this fee schedule was made pursuant to the terms of bilateral modification 0002. However, modification 0002 was effective only from September 1, 1997 through September 30, 1998. Beginning on October 1, 1998, the fee schedule reverted to the fee schedule effective under the contract, and UNICOR has made no further price adjustments to the contract.

My review of the contract has revealed that UNICOR inadvertently incorporated into the contract FAR 52.249-2 (Termination for Convenience of the Government (Fixed-Price)) when, in fact, FAR 52.249-4 (Termination for Convenience of the Government (Services) (Short Form)) is the clause that applies to this contract. Accordingly, UNICOR asks that CoreConcepts prepare its termination settlement proposal for the contract in accordance with FAR 52.249-4, not FAR 52.249-2. As your March 19, 1999 letter states, UNICOR will expect to receive Core Concept's final termination settlement by Thursday, July 17, 1999.

* * * *

Def.'s Ex. I at 183-184.

On May 26, 1999, plaintiff presented its Termination Settlement Proposal, proposed in accordance with FAR 52.249-2, requesting a total of $7,076,968.00. Def.'s Ex. J at 187-225. In its proposal, $6,274,196.00 was listed as a settlement with a subcontractor, "Core Services," a company having the same address as plaintiff. Id. at 211-16.

Counsel for the Federal Bureau of Prisons ("FBOP"), by a letter dated June 25, 1999, responded to plaintiff's Termination Settlement Proposal. Def.'s Ex. K at 226-30. FBOP counsel disputed plaintiff's s reliance upon the FAR 52.249-2 clause which was "inadvertently" incorporated into the contract. FBOP counsel asserted that FAR 52.249-4 was the appropriate clause in that FAR 49.502 mandates its use for service contracts of the nature involved. Id. at 226-27. By use of FAR 52.249-2, FBOP counsel indicated that costs were claimed for which plaintiff was not entitled. The letter stated (in part):

* * * *

Rather, in accordance with FAR 52.249-4, UNICOR is liable only for "payment under the payment provisions of this contract for services rendered before the effective date of termination." The effective date of the termination for convenience was April 18, 1999. Therefore, CoreConcepts is only entitled to recover payment for services rendered before April 18, 1999. Because the contract provided that CoreConcepts would be paid only for completed orders, CoreConcepts' recovery is limited to payment for services rendered before April 18, 1999 that resulted in orders that CoreConcepts submitted to UNICOR by April 18, 1999.

* * * *

Id. at 228.

In addition to the matter of the applicable termination clause for the contract, FBOP counsel also questioned the subcontract settlement incorporated in plaintiffs

Termination Settlement Proposal stating as follows (in part):

* * * *

In addition to challenging the method under which CoreConcepts prepared the termination for convenience cost proposal, I also question CoreConcepts' identification of a subcontractor, Core Services. Not until CoreConcepts submitted its termination for convenience cost proposal was UNICOR notified that CoreConcepts had a subcontractor. To the contrary, in its proposal, CoreConcepts identified Core Services as a "sister company" and further described Core Services in its. "Technical Plan Synopsis" (copy attached). Further, in its proposal, CoreConcepts found inapplicable to its company the "Small Business and Small Disadvantaged Business Subcontracting Plan" and the "Summary Subcontract Report)" (SF 295), thereby notifying UNICOR that there were no subcontracting possibilities. If during the formation or performance of the contract CoreConcepts hired a subcontractor, it was required to submit to UNICOR a subcontracting plan, in accordance with FAR subpart 19.7. To facilitate UNICOR's review of the termination for convenience cost proposal, please provide me with documentation of Core Services' status as a subcontractor.

* * * *

Id. at 229.

On July 15, 1999, plaintiff submitted a second and revised Termination Settlement Proposal, seeking a total recovery of $7,436,968.00 which was comprised

of: $343,988.00 in "Termination Costs"; $52,759.00 in "Non-Recurring" costs; and various "Future Profitability" projections and estimates totaling $7,040,221.00. Def.' s Ex. D at 137-68. Plaintiff certified this submission as a claim. The submission was, again, prepared in accordance with FAR 52.249-2. The submission did not include a specific subcontractor termination settlement.

UNICOR referred plaintiff s July 15, 1999 Termination Settlement Proposal to the Defense Contract Audit Agency ("DCAA") for audit. DCAA was requested to base its audit on FAR 52.249-4. DCAA's 19-page report, dated February 16, 2000, concluded: "We question all proposed costs. The contractor has not furnished sufficient evidential matter to justify proposed cost and profit with applicable FAR regulations and contract terms." DeVs Ex. L at 233. Although the audit was based on FAR 52.249-4, alternative discussion based on FAR 52.249-2 was included in the Report. Id. at 238-39.

By a five-page letter, dated April 26, 2000, the contracting officer issued a final decision on plaintiffs Termination Settlement Proposal. Def.' s Ex. E at 169-73. Each of plaintiff s cost items was discussed and disallowed with reference made to FAR provisions asserted to be applicable. For example, plaintiffs "Future Profitability" items totaling $7,040,221.00 were disallowed as anticipatory profit with reference made to FAR 49.202. The letter concluded, "[i]n view of the above information, it is our decision that UNICOR will not offer any monetary amount to CoreConcepts as settlement for the termination of contract number IPI-C-3114-97." Id. at 172.

On May 24, 2000, plaintiff filed its complaint in this matter. Plaintiff asserts claims: for termination costs

(Compl. at ¶ ¶ 17, 19); and breach of contract damages, (Compl. ¶ ¶ 21, 23, 25, and 27). Defendant seeks dismissal of the complaint on several grounds, but primarily on the assertions that (1) no breach of contract claim was presented to the contracting officer, and (2) no claim was presented to the contracting officer contesting the application of the FAR 52.249-4 termination clause to the termination settlement involved.

DISCUSSION

There is no dispute over the requirement that a claim must first be submitted to the contracting officer for a decision before this Court would have jurisdiction over a direct access suit on the same claim. 41 U.S.C. §§ 605(a), 609(a)(1); James M. Ellett Const. Co., Inc. v. United States, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996).

Plaintiff's breach of contract damage claims are premised upon the allegation that the contract involved in this litigation was "unlawfully terminated." Plaintiff states in its opposition that, "[t]he paper which the Court must consider in ruling on the Motion to Dismiss shows that CoreConcepts submitted a distinct breach claim to the UNICOR Contracting Officer, that this claim was certified, that this claim was for a specific sum, and that the UNICOR Contracting Officer has made a determination on this claim." Pl.'s Opp'n at 11. This statement must refer to plaintiff's July 15, 1999 Termination Settlement Proposal. This proposal states (in part): "In accordance with FAR 52.249-2 Termination for Convenience of the Government (Fixed Price), the amount CoreConcepts is proposing includes a fair and reasonable allowance for future unrealized profits, termination costs, and recovery of upfront and one time costs as CoreConcepts

investment in this project required." Def.'s Ex. D at 142. An examination of the proposal (claim) submitted to the contracting officer does not indicate the presence of any assertion that the termination was unlawful. The DCAA and the contracting officer evaluated the claim under the FAR provisions relating to termination settlements, and the contracting officer's April 26, 2000 decision addresses only the termination settlement proposal items presented.

A claim that a termination for the convenience of the government is unlawful concerns a different set of operative facts than those involved in reaching an appropriate termination settlement based on a submitted proposal. Setting forth items of anticipated profit in a termination settlement proposal is not sufficient to assert an unlawful termination breach claim. Kinetic Builder's Inc. v. Peters, 226 F.3d 1307, 1312 (Fed. Cir. 2000); Santa Fe Engineers, Inc. v. United States, 818 F.2d 856 (Fed. Cir. 1987) (changing rationale for claiming same costs comprises new claim); Croman Corp. v. United States, 44 Fed. Cl. 796, 802 (1999).

In the absence of bad faith or a clear abuse of discretion, a contracting officer's decision to terminate a contract for the convenience of the government is conclusive. Krygoski Const. Co., Inc. v. United States, 94 F.3d 1537, 1543 (Fed. Cir. 1996), cent. denied, 520 U.S. 1210 (1997). Thus, bad faith or an abuse of discretion by the contracting officer must be specifically set forth and considered as a part of the operative facts comprising a breach of contract claim premised on a convenience termination decision. Plaintiff's July 15, 1999 Termination Settlement Proposal contains only a single oblique reference to bad faith in its "Conclusion" as follows:

5. Core Services believes that certain Unicor management personnel acted in bad faith and went to great lengths to divert business away from CoreConcepts in direct conflict with Wendell Chandler's letter dated 12-2-97. Also, orders dated prior to our contract termination date with installation requirements in many cases have been diverted to other contractors, circumventing the installation portion of our contract.

Def.'s Ex. D at 145.

However, no claim was presented involving diversions of business in derogation of the requirements contract at issue. Moreover, this assertion in no way sets forth a claim that the contracting officer's termination decision was a product of bad faith, or abuse of discretion.

Accordingly, after reviewing all the paper which counsel have submitted in this matter, it is concluded that the submission plaintiff made to the contracting officer does not include any assertion of the type required to set forth a breach of contract claim based upon an unlawful contract termination decision. See Salsbury Industries v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990), cent. denied, 498 U.S. 1024 (1991); Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578,1581 (Fed. Cir. 1995); Krygoski Constr. Co., Inc., supra; T & M Distributors, Inc. v. United States, 185 F.3 d 1279 (Fed. Cir. 1999) (Termination claim resolved; breach claim dismissed).

Absent a previous specific claim submission to the contracting officer, plaintiff's pleaded breach of contract claims must be dismissed.

Defendant also asserts that plaintiff did not present a claim to the contracting officer contesting the use, by the contracting officer, of the FAR 52.249-4 (Termination for Convenience of the Government (Services) (Short Form)) clause in evaluating plaintiff's termination settlement proposal and in the final decision, dated April 26, 2000.

There is no dispute that the contract expressly incorporated the FAR 52.249-2 (Termination for Convenience of the Government (Fixed Price)) clause. With respect to the incorporation of the FAR 52.249-4 clause, FAR 49.502(c) states:

(c) Service contracts (short form). The contracting officer shall insert the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form), in solicitations and contracts for services, regardless of value, when a fixed-price contract is contemplated and the contracting officer determines that because of the kind of services required, the successful offer or will not incur substantial charges in preparation for and in carrying out the contract, and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination. Examples of services where this clause may be appropriate are contracts for rental of reserved parking space, laundry and dry cleaning, etc.

48 C.F.R. § 49.502(c) (1999).

The papers submitted by the parties do not indicate that the contracting officer determined, at the time of contract award, that because of the kind of services required the successful offer or would not incur substantial charges in preparation for and in carrying

out the contract, or that any termination settlement charges would be limited to services rendered before the date of termination.

The termination letter of March 18, 1999, cited the contract clause, FAR 52.249-2. The contracting officer's letter of April 9, 1999, was the initial notification to plaintiff that FAR 52.249-2 was "inadvertently incorporated" into the contract, and that FAR 52-249-4 was the applicable clause. The papers do not reveal any express amendment of the contract to substitute FAR 52.249-4 for FAR 52.249-2. It is undisputed that plaintiff expressly cited FAR 52.249-2 in submitting its Termination Settlement Proposal (claim).

In this circumstance, it is concluded that plaintiff sufficiently indicated its position to the contracting officer that the contract clause, FAR 52.249-2, was the applicable basis for its Termination Settlement Proposal claim. To the extent that the application of FAR 52.249-4 to determine the appropriate termination settlement in this matter could be construed to comprise a government claim, it is also concluded that this has clearly been the subject of a contracting officer's decision and the issue, as to the appropriate clause, is before the Court for resolution.

However, this issue as to whether FAR 52.249-2 or FAR 52.249-4 controls the determination of the appropriate termination settlement cannot be resolved on the present submissions. Unlike the situation in G. L. Christian and Associates v. United States, 160 Ct. Cl. 1, 312 F.2d 418, aff'd on reh'g, 160 Ct. Cl. 58, 320 F.2d 345 (1968), the use of FAR 52.249-4 is not mandated for all services contracts. To incorporate this clause, FAR 49.502(c) requires certain preliminary determinations.

If these are lacking, an issue arises as to whether the facts are such that plaintiff should have realized that the use of FAR 52.249-2 was in error. See S.J. Amoroso Const. Co., Inc. v. United States, 12 F.3d 1072, 1076 (Fed. Cir. 1993). This will require further ventilation of the facts surrounding the circumstances at the time of the contract award if defendant continues to press the application of FAR 52.249-4 to determine the termination settlement amount.

However, whether FAR 52.249-2 or FAR 52.249-4 is controlling, plaintiff's proposed settlement items involving anticipatory profits are not recoverable. Salsbury Industries v. United States, 905 F.2d at 1521, (Fed. Cir. 1990); Dairy Sales Corp. v. United States, 219 Ct. Cl. 431, 438, 593 F.2d 1002, 1006 (1979).

With respect to the remaining proposed settlement items questioned in defendant's motion, it is concluded that additional proceedings are required which may include appropriate expert audit evidence.

MOTION FOR STAY OF DISCOVERY

Defendant's motion also seeks a stay of discovery. It is stated that plaintiff propounded discovery requests on July 17, 2000. No indication is furnished as to the nature of the discovery involved. As, by this Order, plaintiff s breach of contract and anticipatory profit claims are dismissed, any discovery needed will now be addressed to the issues remaining for litigation. To this end, a Pretrial Order shall be issued, concurrently with this Order, which, in part, addresses the sequence of discovery. Current outstanding discovery will be stayed, but to the extent any such discovery is still relevant, it can be reinstituted consistent with the pretrial procedures ordered.

CONCLUSION

Consistent with the above discussion, it is ORDERED:

(1) The Breach of Contract Claims pleaded in paragraphs 21, 23, 25, and 27 of plaintiff's complaint, filed May 24, 2000, shall be DISMISSED;

(2) To the extent that the Anticipatory Profit items incorporated in plaintiff s Termination Settlement Proposal are pleaded as claims other than for breach of contract, they shall also be DISMISSED;

(3) Any outstanding discovery requests are stayed, pending any appropriate revision and reissuance, to the extent they remain relevant;

(4) Except as herein GRANTED, Defendant's Motion to Dismiss and for a Stay of Discovery, filed October 6, 2000 is, otherwise, DENIED;

(5) Defendant's response to all portions of the complaint still extant shall be filed, with the Clerk's Office, on or before November 16, 2001.

James F. Merow
Senior Judge